BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL GETHINS	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,491
CEDAR LIVING CENTER	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY OF ILLINOIS	)	
Insurance Carrier	)	

ORDER

Claimant appeals the April 21, 2000, Order of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the Administrative Law Judge found claimant had failed to provide notice of accident within ten days and had failed to establish just cause for enlarging the notice period to 75 days. By inference from that Order, the Administrative Law Judge also found claimant suffered accidental injury around October 10, 1999, with no additional accidental injuries occurring through October 30, 1999, as was alleged.

ISSUES

Claimant raises the following issues for Board consideration:

"(1) Does substantial competent evidence support the implied finding that there was only one accident occurring on or about October 10, 1999?

(2) Assuming there was only one accident occurring on or about October 10, 1999, did claimant meet her burden of proof to show just cause as to why notice was not provided until October 30, 1999?"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For preliminary hearing purposes, the Appeals Board finds as follows:

Issue No. 1 implies that the test on appeal is one of substantial competent evidence. To the contrary, it is well established that the Board conducts de novo review on the record. K.S.A. 1999 Supp. 44-555c(a); Helms v. Pendergast, 21 Kan. App. 303, 899 P.2d 501 (1995).

Claimant alleges accidental injury while working as a CNA for respondent on or about October 10, 1999. On that date, claimant was lifting a patient by the name of Bartis Brown and suffered an immediate onset of pain in her back, which claimant described as "hurting bad."

Claimant acknowledges she did not report that incident to respondent until November 1, 1999, and failed to complete an accident report until November 10, 1999. Claimant continued working for respondent through October 30, 1999.

At preliminary hearing, claimant testified that a second accident occurred on or about October 23, 1999, and that she was immediately referred to a doctor for treatment the next Monday. However, claimant's first medical examination did not occur until November 1, 1999. This would indicate that claimant's second alleged date of accident should, instead, have occurred on or about October 30, 1999.

The medical records provided do not support claimant's allegations of a second alleged accidental injury. Claimant was referred to Richard May, M.D., on November 1, 1999. At that time, claimant advised the doctor that her back had gone out approximately one month before, while lifting people at work. There was no mention of a recent aggravation at work. Claimant was also referred to neurologist Ashok Narayan, M.D., on November 17, 1999. Claimant advised Dr. Narayan that she was doing relatively okay up until approximately three months ago. Since then, she had persistent pain in her entire back from her neck down to her low back. Claimant also advised Dr. Narayan that her problems were aggravated approximately one month before, while lifting a patient at work. The November 17, 1999, report contains no mention of a more recent alleged injury at work.

On December 10, 1999, claimant went to Douglas Fair, D.C., for chiropractic treatment. She advised Dr. Fair that she had severe neck pain, with headaches and "MTs & LBP," with all of it starting approximately November 1, 1999. Claimant advised Dr. Fair that her problem started while lifting a resident at work on October 23, 1999, a history different than that provided the earlier doctors.

Finally, while being cross-examined, claimant acknowledged, during the month of October or perhaps during the month of September, she was uncertain, she was assisting her husband in putting a sidewalk in at their house. Claimant was involved in mixing and pouring concrete. Claimant downplayed the incident by alleging that she was mixing the concrete, using only a cottage cheese container.

Claimant alleges that she advised her supervisor, Margie (Margaret Wilson, the director of nursing), immediately of the October 30, 1999, injury. When claimant was discovered on that date, she was standing in the hall, crying, because her back was hurt. Claimant acknowledged that she did not advise her supervisor that the spasms on that date were from lifting a patient.

As a result of the confusion surrounding the claimant's allegations, the Administrative Law Judge referred claimant to Lee R. Dorey, M.D., an orthopedic surgeon in Hutchinson, Kansas, for an independent medical examination on April 3, 2000. Dr. Dorey was provided extensive medical records from claimant's past which detailed a 1993 herniated disc at L5-S1 with corresponding surgery. Dr. Dorey diagnosed claimant with lumbar disc disease and a possible recurrent herniation at L5-S1, as well as cervical spine disc disease, multiple levels, and possible osteoporosis. He opined that claimant reherniated her disc at L5-S1 while "pulling residents" on October 9 or 10, 1999. He stated in his report that the pain up and down claimant's spine was due to the intense nerve irritation she was experiencing from the L5-S1 disc. He went on to state "I do not believe her working between the 10th and 30th of October would make any difference in her clinical presentation."

The medical records do not support a finding that claimant suffered additional injury on or about October 30, 1999. Had claimant suffered an additional injury on or about that date, she would have likely advised either Dr. May on November 1 or Dr. Narayan on November 17 of the incident. Neither record contains a mention of a recent injury. Not until claimant was treated by her chiropractor on December 10, 1999, did she finally mention the alleged second injury. The Appeals Board finds claimant failed to prove a second accidental injury on or about October 30, 1999.

The Appeals Board must now consider whether claimant had just cause for not providing notice to respondent of October 10, 1999, accident until October 30, 1999, more than 10 days after the original date of accident.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Appeals Board has listed several factors which must be considered:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

(2) Whether the employee is aware he or she has sustained an accident or an injury on the job.

(3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

Russell v. MCI Business Services, WCAB Docket No. 201,706 (Oct. 1995).

In this instance, claimant's accident was a sudden and traumatic event on or about October 10, 1999, which caused her significant pain.

Claimant also testified that she was fully aware of the reporting requirements of respondent. Respondent's representative, Christina Gillespie, the office manager, testified that the workers' compensation posters, discussing the various requirements including notice of accident, were posted next to the time clock. In addition, the employees were instructed to report injuries immediately and to prepare an accident report. Claimant's accident report was not prepared until November 10, 1999, although respondent acknowledges being advised verbally of claimant's injuries on November 1, 1999.

The Appeals Board finds that claimant failed to provide just cause for her lack of notice to respondent of the October 10, 1999, accident. The single traumatic nature of the accident, with the ongoing problems described by claimant, does not justify claimant's delay. In addition, claimant advised Ms. Wilson that she was aware she should have filled out an accident report, but simply forgot to do so on several occasions.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated April 21, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

c: James R. Roth, Wichita, KS
William L. Townsley, III, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director